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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1661.

JOHN C. DENNY, S. B. HOPKINS, AND T. F. WALLACE, PLAINTIFFS IN ERROR,

vs.

PIRONI AND SLATRI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED MARCH 18, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 20, 1891.

1 Be it remembered that at a term of the circuit court of the United States in and for the fifth circuit of the United States and the northern district of Texas, begun and holden at the city of Dallas on the 12th day of January, A. D. 1891—present and presiding, the Honorable A. P. McCormick, United States district judge—and which term adjourned on the 6th day of March, A. D. 1891, the following cause came on for trial, to wit:

PIRONI & SLATRI
vs.
J. C. DENNY. } #1251.

Plaintiffs' First Amended Original Petition.

Suit in the Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } #1251.

Now come the plaintiffs and, by leave of court, file this their first amended original petition in lieu of their original petition filed herein on October 19th, 1889, and plead anew as follows:

To the honorable judges of said court:

Your petitioners, Pironi & Slatri, a mercantile firm and copartnership, composed of C. B. Pironi and F. Slatri, complaining of J. C. Denny, hereinafter called defendant, show to the court—

1. That petitioners, who are hereinafter styled plaintiffs, are and were at the times of the accrual of the causes of action hereinafter stated a mercantile firm, composed as aforesaid, engaged in the wholesale wine and liquor business in the city and county of Los Angeles, California, where both of said plaintiffs also reside; that defendant is a resident citizen of Dallas county, Texas, within
2 the northern judicial district of Texas.

2. And for cause of complaint plaintiffs show that heretofore, to wit, in the months of July, August, and September, 1889, one S. S. Momand was a merchant engaged in the retail grocery business in Dallas city, Texas, and he was a dealer in wines and liquors, doing business under the trade name of S. S. Momand & Co.; that during said time, and particularly in the month of July, and also on the 29th day of said month and subsequent thereto, during the months of August and September, said Momand was heavily involved in debt, and he was on the very verge of insolvency, his liabilities being enormous and far in excess of his capital, resources, and assets, and said Momand was then in contemplation of insolvency; that said defendant, J. C. Denny, was then and there fully informed of this fact, but plaintiffs were then wholly ignorant thereof; and on said July 29th, 1889, the said Monamd, well knowing his

said failing condition as a business man, approached the agent and representative of the plaintiffs in Dallas, Texas, and made the grossest misrepresentations to him as to his, the said Momand's, capital, assets, and business condition and as to the profitable character of his business; and said Momand, among many other things, showed and stated to plaintiffs' agent that he, said Momand, had six thousand ($6,000.00) dollars of his own money as capital invested in his said business; that his said business had been and was very profitable and prosperous, insomuch that his net gain from his said business had been during the seven months next preceding the large sum of $3,739.07; that his assets were then $8,239.07 over and above all his liabilities; that he was doing a good business and a profitable one, all of which representations and statements were then and there false and were so known then and there by said Momand to be false, but the agent of the plaintiffs
3 and the plaintiffs themselves were wholly ignorant of their falsity, but relied upon the same as true; that said Momand well knew that he was then on the verge of insolvency, and, as aforesaid, he was in contemplation of insolvency, and yet he made said representations with intent to deceive and defraud the plaintiffs and to induce plaintiffs to deliver to him a large amount of their goods on a credit; that plaintiffs, relying upon the truth of said representations so made by said Momand and at his special instance and request, were induced to contract to sell and to deliver and plaintiffs did deliver to said Momand during the months of August and September, 1889, a large amount of their said goods, wares, and merchandise on a credit of six months from July 29th, 1889; and plaintiffs, at the solicitation of said Momand, delivered to him, on a credit to be paid for six months from July 29, 1889, the goods, wares, and merchandise particularly specified in the account hereto attached and made a part of this petition, marked Exhibit "A," which goods were delivered to said Momand by plaintiffs because of said Momand's representations as aforesaid and because plaintiffs believed him to be in a prosperous financial condition; that said goods, wares, and merchandise, being wines and liquors, are reasonably worth and are valued at the sums respectively stated after the different items in said account, and in the aggregate are valued at and are reasonably worth the sum of $2,224.70. Plaintiffs show that said goods, wines and liquors, were delivered to said Momand by plaintiffs by reason of their reliance upon said Momand's said statements made to them and their agent and by reason of statements as to his financial condition which had been made by said Momand to "Dunn's Mercantile Agency," which agency said Momand knew procured statements from him as a basis of credit
4 for merchants in general, and said Momand well knew that plaintiffs would seek for and rely upon statements so made by him to said mercantile agency; that the said statements of his condition as made by him to said agency showed him to be in fine financial condition, but were wholly false and fraudulent, as the statements so made by him showed that his condition was prosperous and his business profitable, and plaintiffs, relying upon said

statements and representations, delivered their said goods to said Momand in consideration of said Momand's promise and agreement then and there made to pay for said goods their reasonable value, as aforesaid, six months after the 29th of July, 1889.

3. Plaintiffs also aver and charge that said Momand, at the time he induced and procured plaintiffs to part with their said goods, also specified in Exhibit "A," was on the very verge of insolvency and had no tangible property subject to levy of legal process save his stock in trade in his store in Dallas, Texas, and he was then overwhelmed with debts far in excess of all his assets, and all of which was well known to him and was unknown to plaintiffs and their agent; and, further, at the time that said Momand induced plaintiffs to deliver to him their said goods aforesaid, said Momand had no intention of ever paying for them, but it was his intention to cheat and defraud these plaintiffs out of their said goods and their value.

4. For plaintiffs show that almost before the removal of their said goods from the cars in which they had been shipped, and very shortly after they had come into said Momand's possession, said goods mentioned in Exhibit "A" were seized by writs of attachment sued out by the defendant against the said S. S. Momand, and also by a writ of attachment sued out by Wallace & Waggoner, a firm of wholesale grocery merchants in Dallas, Texas, under the following circumstances, viz:

5. Plaintiffs charge that in the month of September, 1889, said defendant, J. C. Denny, and said firm of Wallace & Waggoner, wholesale grocers, acting personally and through*t* their agent and Dallas city salesman, one Geo. W. Cleveland, entered into and formed a fraudulent conspiracy and combination with the said S. S. Momand, by which all said parties agreed that Momand should be sued and attachment writs should be levied upon all of his tangible property by the said firm of Wallace & Waggoner and by the said defendant, J. C. Denny, and the said parties agreed together fraudulently and for the purpose of defeating the just creditors of said S. S. Momand and of hindering and delaying them in the collection of just debts against said S. S. Momand that said attachments should be levied as aforesaid, and that judgments should be suffered by the said S. S. Momand and obtained against him by the said Wallace & Waggoner and the said J. C. Denny, and a transfer of all of said Momand's property and stock in trade should be thus effected.

6. That in pursuance of said combination and conspiracy said Wallace & Waggoner, together with said J. C. Denny, did, on October 1st, 1889, late at night of said day, institute three separate suits in the district court of Dallas county, Texas, against the said S. S. Momand, one in favor of said Wallace & Waggoner and two in favor of said defendant, J. C. Denny, and the said Wallace & Waggoner did then make an affidavit for attachment and did procure a writ of attachment to be issued against said S. S. Momand's property for the sum of $6,243.53, the said attachment being based upon the alleged ground then stated in their affidavit for attachment, that the said Momand "was about to dispose of his property with intent to

defraud his creditors;" and the said defendant, J. C. Denny, also at the same time, jointly with said Wallace & Waggoner and
6 acting in concert and by agreement with them, instituted his said two suits against said S. S. Momand, claiming an indebtedness of $10,500.00 against the said Momand, and in his affidavit for attachment the said defendant, J. C. Denny, also swore that said Momand "was about to dispose of his property with the intent to defraud his creditors;" and said Wallace & Waggoner and said J. C. Denny, acting together and being then and there in collusion with the said S. S. Momand, and the said S. S. Momand consenting thereto, caused their said three certain writs of attachment to be placed in the hands of the sheriff of Dallas county, and same were simultaneously on the night of Oct. 1st, 1889, levied upon all of the tangible property owned by the said Momand, and also the same were levied upon the goods, wares, and merchandise specified in said Exhibit "A."

Now, plaintiffs show and aver that the said J. C. Denny, defendant, and the said Wallace & Waggoner acted jointly in suing out and levying their said writs of attachment, and the same were the result and purpose of the said fraudulent combination and conspiracy into which they had entered for the purpose of hindering and delaying and defrauding the just creditors of the said S. S. Momand, and for the purpose of effecting a transfer of all said Momand's property for the joint benefit of them all, and for the purpose of appropriating all of pl'ffs' said property specified in Exhibit "A" to their own use and benefit.

Plaintiffs specially charge and aver that the said grounds upon which the said attachment writs were sued out did not in fact exist, and all the affidavits on which the same were predicated were well known to be false by the said defendant, J. C. Denny, and by the said Wallace & Waggoner, and plaintiffs specially charge that there were no legitimate grounds or just grounds for attachment,
7 such as were alleged in said affidavits at the time that said attachment writs were sued out and levied, but that the same were sued out and levied fraudulently and upon alleged grounds which in fact did not exist.

9. And plaintiffs specially charge that the said debt then sued for by the said defendant, J. C. Denny, and for which he attached did not in fact exist, but the same was fictitious, colorable, pretended, and simulated only, and the suits were brought by the said J. C. Denny upon fictitious demands to hinder and delay creditors of said Momand and to remove all of his property out of the reach of the legitimate creditors of said Momand and to apply said property to his own use and benefit jointly with said Wallace & Waggoner and with said Momand.

10. That said Wallace & Waggoner and said J. C. Denny continued to act together in the prosecution of their pretended claims and suits as aforesaid against said S. S. Momand, who fully consented thereto.

11. That thereafter, on Oct. 14th, 1889, and while all of said attached property was in the hands of the sheriff of Dallas county,

Texas, the firm of Schneider & Davis, of Dallas city, Texas, who were *bona fide* creditors of said Momand, having sued out and levied their writ of attachment upon the entire property of said Momand subsequent to and subject to said attachment writs of said conspirators, Wallace & Waggoner and def't, J. C. Denny, filed in the district court of Dallas county, Texas, a petition in the nature of a bill in chancery or creditor's bill, making said Wallace and Waggoner and said defendant, J. C. Denny, parties thereto as defendants, and alleging and charging that the said attachments of said J. C. Denny were *in toto*
fraudulent, fictitious, and colorable and void as to *bona fide* cred-
8 itors of said Momand, and praying for an injunction restraining the execution of orders of sale of said attached property, and praying that a receiver be appointed by the court to take charge of said attached property, and that the attachments of defendant, J. C. Denny, be declared fraudulent, null, and void, and that the attached property be sold by the receiver and the proceeds be distributed by the court according to the priorities of the valid liens and in accordance with equity and good conscience; that upon the filing of said bill the said court granted an injunction against J. C. Denny and Wallace & Waggoner and the sheriff of Dallas county, and set Oct. 28, 1889, as the day to hear the application for a receiver; that an order of sale had, however, been obtained by said Wallace & Waggoner theretofore and notice thereunder had been posted, fixing the sale for Oct. 18, 1889, during legal hours of said day; that on said Oct. 18, 1889, the said defendant, J. C. Denny, in pursuance of his design to hinder, delay, and defraud the *bona fide* creditors of said Momand, and colluding with said Momand and being assisted by him to that end, paid to said Schneider & Davis $2,000 (he, said Denny, paying $500 and said Momand paying $1,500 to make up said $2,000), and thus said conspirators procured and induced said Schneider & Davis to dismiss their said bill, and same was immediately dismissed, and the writs of injunction which had been issued thereunder were at once dissolved, and within an hour thereafter said Denny procured the sheriff of Dallas county, Texas, to make sale of said attached stock, and he himself became the purchaser thereof for the sum of $10,080.00, although said stock of goods was well worth the sum of $25,000 to $30,000, and all of said stock was delivered to said Denny, and he took possession of pl't'ffs' said goods described in Exhibit "A," and, though demanded,
he refused and always refuses to deliver same to pl'ffs.

9 12. That plaintiffs' said goods described in Exhibit "A" having been obtained from them by the said Momand by fraud, as above set out, plaintiffs were and are entitled to re-cind said contract to sell same to said Momand, and they are entitled to re-cind and avoid said contract to sell and to recall the delivery thereof, for pl'ffs show that ever since said 1st of October, 1889, after stripping himself of all his tangible property, by the aid and assistance of said J. C. Denny & Wallace & Waggoner as aforesaid, and as the result of said conspiracy between said parties aforesaid, said Momand has continuously been and is now openly, wholly, and notoriously insolvent, and he has never had, since said date, and

has not now any property out of which pl'ffs could or can make their debt; and pl'ffs promptly elected to re-cind the said contract to sell their said goods to said Momand and to reclaim said goods from him and said Denny, as still being pl'ffs' property, yet said Denny, though fully advised of the fraud practiced by said Momand on pl'ffs in inducing them to part with their said goods and having notice of same and of pl'ffs' consequent rights to their said goods before he came into possession thereof, has wholly refused, though requested, to deliver said goods to pl'ffs, but he wrongfully detained and still detains from pl'ffs their said goods.

13. Plaintiffs further aver that, by reason of the facts above set out, they are in law the owners still of said goods described in said Exhibit "A," and the title never in law passed out of pl'ffs and they are entitled to the possession thereof; that defendant, Denny, unlawfully detains same from pl'ffs.

14. Plaintiffs specially deny that said Denny is an innocent purchaser for value of pl'ffs' said goods, and they deny that he is entitled to hold same as a purchaser at sheriff's sale under attachment free from the rights and title of plaintiffs thereto, for pl'ffs charge that said Denny was intimately associated with said Momand during all of his business career in Dallas, Texas, and had notice of the fraud which said Momand practiced on pl'ffs by which he procured pl'ffs' said goods as aforesaid, and he was a conspirator with said Momand and acted in concert and in fraudulent combination with said Momand and said Wallace & Waggoner as aforesaid, and he came into possession of said goods with full notice of pl'ffs' rights as aforesaid.

And plaintiffs allege that after satisfying the claim for which said Wallace & Waggoner sued and attached said Momand, together with all costs, there yet remained more than $2,500 of the $10,080.00 paid by said Denny to said sheriff at the said attachment sale, which sum was turned back at once to said Denny on his claim which he fraudulently and collusively prosecuted against said Momand, and which said sum so received back by him was more than the value of pl'ffs' said goods.

15. Premises considered, plaintiffs now pray judgment against said Denny for their said goods so detained by him, with interest on their value at 8 per cent. per annum from the institution of this suit, or, in case the said goods cannot be found, in the alternative, for their value and interest as aforesaid, and pl'ffs pray for all further relief, both general and special, to which the court may deem them entitled; and pl'ffs will ever pray, &c.

McCORMICK & SPENCE,
R. E. COWART,
Att'ys for Pl'ffs.

11 LOS ANGELES, CAL., *Aug.* 20, 1889.

Messrs. S. S. Momand & Co., bought of Pironi & Slatri, manufacturers & dealers in wines & brandies.

"EXHIBIT A."

157 gals. beiger wine, 50	78 50
164 " hock " 50	82 00
167 " reisling " 75	125 25
158 & 154—312—gals. claret, No. 1, 40	124 80
154 & 159—313 " " No. 2, 30	93 90
157 gals. zinfoudel wine, No. 1, 75	117 75
161 " " " No. 2, 50	80 50
163 & 159 & 151—473—gals. angelica wine, 75	354 75
168 gals. old port wine, No. 1, 1.50	252 00
153 & 149—302—gals. port wine, No. 2, 75	226 50
169 gals. sherry wine, No. 1, 1.50	253 50
156 & 155—311—gals. sherry wine, No. 2, 75	233 25
40 gals. old brandy, 2.50	100 00
51 " grape brandy, 2.00	102 00
	$2,224 70

18 casks, 2 bbls.

Duplicate bill; original in possession of S. S. Momand & Co., Dallas, Tex.

The foregoing has the following endorsement, to wit:
1251. Pironi & Slatri *vs.* J. C. Denny. Pl'ffs' 1st amended original petition. Filed Feb'y 17, 1891. J. H. Finks, clerk, by Chas H. Lednum, deputy. R. E. Cowart, McCormick & Spence, att'ys for plaintiffs.

12 *Defendant's First Amended Original Answer.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251.

Now comes the defendant in the above-entitled cause and by leave of the court files this his first amended original answer, and says that the matters and things contained in plaintiffs' first amended original petition in this cause, filed on February 17, 1891, are insufficient in law to entitle the plaintiffs to maintain this suit.

And, specially excepting to said petition, this defendant says that said petition seeks to charge him as a fraudulent vendee of property

upon which the plaintiffs assert no lien and seeks to recover a personal judgment against this defendant as such.

CRAWFORD & CRAWFORD,
Att'ys for Defendant.

And, answering, this defendant denies all and singular the allegations contained in plaintiffs' petition.

CRAWFORD & CRAWFORD,
Att'ys for Defendant.

And, further answering, this defendant says that on October 1st, 1889, Wallace & Waggoner instituted their suit in the district court of Dallas county against S. S. Momand to recover a large sum of money, to wit, the sum of $6,243.53; that in said suit an attachment was issued on the same day the suit was filed, and was levied, amongst other things, upon the property and goods described in the plaintiffs' first petition filed herein; that said levy was so
13 made by the sheriff of Dallas county, Texas; that afterwards, on the 12th day of October, 1889, said Wallace & Waggoner made their application to the Hon. R. E. Burke, judge of the district court in and for Dallas county, and before whom said cause was pending, for an order to sell said property so attached, as provided by the statute laws of the State of Texas, and that upon the consideration of said application the said R. E. Burke, judge as aforesaid, on the 12th day of October, 1889, directed said property to be sold by the sheriff of Dallas county; that on the 18th day of October, 1889, W. H. Lewis, sheriff of Dallas county, pursuant to the said order of sale, sold said property for the sum of $10,085 in cash; that at said sale the defendant, J. C. Denny, became the purchaser; that said sale was conducted in all things according to law; that this defendant paid in cash the amount of his bid to said sheriff, which money was duly returned into the district court of Dallas county, whence said order of sale had issued. Defendant denies all fraud or collusion of any and every character, and says that by said sale the title to said property became irrevocably vested in him.

Defendant says that the plaintiffs before said sale were represented in the city of Dallas by an agent; that said agent knew the writ of attachment had been levied upon said property; that he was then fully advised of his rights (rights of the plaintiffs), if any he had; that he refused to claim said property or take any legal steps to recover said property and disaffirm said contract, but permitted said sale to be made and this defendant to become the purchaser, and never sought to re-cind or annul the contract of sale between the plaintiffs and S. S. Mormand until after said property had been sold
14 by the sheriff of Dallas county under the order of sale above referred to, and until after the defendant, Denny, had paid his money therefor, although the plaintiffs were fully advised that said order of sale had been issued, and that said sale would be

made. Wherefore defendant prays to be discharged with his costs, and general relief.

CRAWFORD & CRAWFORD,
Att'ys for J. C. Denny.

The foregoing has the following endorsement, to wit:
#1251. Pironi & Slater *vs.* J. C. Denny. Defendant's first amended original answer. Filed Feb'y 17, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Crawford & Crawford.

15 *Judgment.*

PIRONI & SLATRI
vs.
J. C. DENNY. } #1251. February 21, 1891.

On February 18th, 1891, this cause came on to be heard, and came the plaintiffs and defendant, by their attorneys, and announced ready for trial; then came a jury of twelve good and lawful men, to wit, T. C. Boatwright, J. D. Givens, J. M. Parks, L. C. Leeds, K. B. Archey, J. N. Mason, J. S. Austin, A. J. Garrett, John Moreland, J. S. Collins, D. G. Tate, and A. J. Fletcher, who were duly and legally selected, empannelled, and sworn to try this cause, who, having heard the evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on Feb'y 21, 1891, returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff as follows:

Original value of wine	2,224 70
Interest, 1 year 4 months 2 days	238 29
	$2,462 99

L. C. LEEDS, *Foreman.*"

It is therefore considered by the court, upon said finding of the jury, that the defendant, J. C. Denny, does wrongfully detain from plaintiffs the personal property described in plaintiffs' petition of the value by items, as is alleged in plaintiffs' petition, and of the aggregate value of $2,224.70, as is alleged by them, and that the plaintiffs' damages by reason thereof amount to the sum of $238.29, being the lawful interest upon the value of said property from the date of the filing of this suit up to this date.

And it is therefore considered by the court that said plaintiffs.

16 Pironi & Slatri (a firm composed of C. B. Pironi and F. Slatri), do have and recover of and from the defendant, J. C, Denny, the following-described personal property, described in plaintiffs' petition and of the value by items as follows, to wit:

157	gals.	bergen	wine	$78 50
164	"	hock	"	82 00
167	"	reisling	"	125 25
312	"	claret	" No. 1	124 80
313	"	"	" " 2	93 90
157	"	zinfordel	" " 1	117 75
161	"	"	" " 2	80 50
473	"	angelica	"	354 75
168	"	old port	" 1	252 00
302	"	port	" 2	226 50
169	"	sherry	" 1	253 50
311	"	"	" 2	233 25
40	"	old brandy		100 00
51	"	grape brandy		102 00
				$2,224 70

And also the said sum of $238.29, as damages, and all costs in this behalf incurred.

And it appearing to the court that said defendant, on the 26th day of October, 1889, filed herein his replevy bond with T. J. Wallace and S. B. Hopkins, as his sureties thereon, by which he did retain possession of said above-described property from the plaintiffs' sequestration writ issued herein and levied thereon, therefore if said property cannot be had and be not forthcoming, and if said damages be not paid according to the legal effect of said replevy bond, then it is further considered by the court, and so ordered and adjudged, that the plaintiffs, Pironi & Slatri, do have and recover,
17 jointly and severally, from said defendant, J. C. Denny, and said T. J. Wallace and S. B. Hopkins, sureties on his replevy bond aforesaid, the said sum of two thousand two hundred twenty-four and $\frac{70}{100}$ dollars, the value, as aforesaid, of said property, and the further sum of two hundred thirty-eight and $\frac{29}{100}$ dollars, the damages aforesaid, with interest on said sums from this date at the rate of eight per cent. per annum, and all costs in this behalf incurred and expended, and for all which execution may issue.

18 *Motion for New Trial.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } #—.

Now comes the defendant and moves the court to set aside the verdict in this cause and grant him a new trial for the following reasons, to wit:

(1.) The court erred in not instructing the jury that the purchase of the goods under the interlocutory order of Judge Burke in the case of Wallace & Waggoner *vs.* S. S. Momand & Company passed a good title to the defendant, and that the plaintiffs' remedy, if they sought any, was against the fund paid into the registry of the court of Judge Burke, there being nothing to show that the defendant in this cause had any connection whatever with the matters embraced in the suit of Wallace & Waggener *vs.* Momand.

(2.) The court erred in instructing the jury that they must find for the plaintiffs unless they believed that every dollar of the debt claimed by J. C. Denny, to wit, $10,500.00, was a just and *bona fide* debt, because the proof showed that the debt sued on in the case of Denny *vs.* Momand was embraced in two separate and distinct suits—one for $6,000 and one for $4,500—and further showed that on the last-mentioned suit nothing was received or collected by Denny, and that the plaintiffs in this cause were in no manner affected by the institution of said suit.

(3.) The verdict is contrary to the evidence, in this: The proof showed, without conflict, that the defendant was a man of property and means: that he was earning from five to six thousand dollars per year, and had been for the past eight years, and that his
19 credit was good. There was no proof before the jury from which they might legitimately draw the inference that any part or parcel of the defendant's claim against Momand was fraudulent or fictitious.

(4.) And for other reasons apparent.

CRAWFORD & CRAWFORD,
Att'ys for J. C. Denny.

The foregoing has the following endorsement, to wit:
1251. Pironi & Slatri *vs.* J. C. Denny. Motion for new trial, Filed Feb'y 23, 1891. J. H. Finks, clerk, by Chas. H. Lednum. deputy.

20 *Order on Motion for New Trial.*

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251. February 23, 1891.

On this day came on to be heard the motion of the defendant for a new trial, and it was argued by counsel, and the court, having fully considered the same, is of the opinion that said motion is not well taken, and therefore orders that said motion be, and the same is hereby, overruled and refused.

21 *Motion to Arrest Judgment.*

In the United States Circuit Court for the Northern District of Texas, at Dallas.

PIRONE & SLATRI
vs.
J. C. DENNY. } # —.

Now comes the defendant in the above-entitled cause and moves the court to arrest the judgment herein rendered because there is no allegation in the petition of the plaintiffs showing that the plaintiffs and defendant are citizens of different States and no allegation to show that this court has jurisdiction to try this cause.

CRAWFORD & CRAWFORD,
Att'ys for Defendant, J. C. Denny.

The foregoing has the following endorsement, to wit:

1251. Pironi & Slatri *vs.* J. C. Denny. Motion to arrest judgment. Filed Feb'y 23, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

22 *Plaintiffs' Remittitur of Part of Judgment.*

Suit in the Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251.

Now, at this time, come Pironi & Slatri, a firm and copartnership composed of C. B. Pironi and F. Slatri, the plaintiffs in the above numbered and entitled cause, each of whom is anow and was at the date of the institution of this suit a citizen of the State of California and a resident of the city and county of Los Angeles, in said State of California, and show to the court that they, on the 21st day of February, 1891, recovered a judgment against the defendant, J. C. Denny, who was at the date of the institution of this suit a citizen of the State of Texas and a resident of the city of Dallas, in said State of Texas, within the northern judicial district of Texas, for certain personal property of the value of $2,224.70, and also damages for its detention in the sum of $238.29, besides interest and costs; and said plaintiffs now in open court remit the sum of five dollars of and from the said sum of $238.29, the damages awarded in said judgment aforesaid; and plaintiffs pray that this remittitur may be noted on the docket and entered in the minutes, and that execution may issue in due course only for the balance of said judg-

ment after deducting said sum of five dollars now here remitted from the damages adjudged as aforesaid.

R. E. COWART,
McCORMICK & SPENCE,
Att'ys for Plaintiffs.

Endorsed: # 1251. Pironi & Slatri *vs.* J. C. Denny. Plaintiffs' remittitur of part of judgment. Filed Feb'y 24, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

23 *Order on Remittitur.*

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251. February 24, 1891.

On this day came into open court the plaintiffs, Pironi & Slatri, and enter their remittitur of judgment herein in words and figures as follows, to wit:

"Suit in Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251.

Now, at this time, come Pironi & Slatri, a firm and copartnership composed of C. B. Pironi and F. Slatri, the plaintiffs in the above-numbered and entitled cause, each of whom is now and was at the date of the institution of this suit a citizen of the State of California and a resident of the city and county of Los Angeles, in said State of California, and shows to the court that they, on the 21st day of February, 1891, recovered judgment against the defendant, J. C. Denny, who was at the date of the institution of this suit a citizen of the State of Texas and a resident of the city of Dallas, said State of Texas, within the northern judicial district of Texas, for certain personal property of the value of $2,224.70, and also damages for its detention in the sum of $238.29, besides interest and costs; and said plaintiffs now in open court remit the sum of five dollars of and from the said sum of $238.29, the damages awarded in said judgment aforesaid; and plaintiffs pray that this remittitur may be noted on the docket and entered in the minutes, and that execution may issue in due course for the balance of said judgment
24 after deducting said sum of five dollars now here remitted from the damages adjudged as aforesaid.

R. E. COWART,
McCORMICK & SPENCE,
Attorneys for Plaintiffs."

Whereupon it is considered by the court and so ordered and adjudged that said remittitur be noted on the docket and filed herein as a part of the record of this cause, and that the said sum of five dollars be, and the same is hereby, remitted from the sum of $238.29 assessed and adjudged as damages in said original judgment herein entered on February 21, 1891; and it is further ordered that execution issue for the balance only of said original judgment after deducting the said amount of five dollars so here remitted.

25 *Order on Motion in Arrest.*

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251. February 24, 1891.

On this day came on to be heard the motion of defendant in arrest of the judgment herein rendered, and the court, having heard and considered said motion, is of the opinion that the same is not well taken, and therefore orders that said motion be, and the same is hereby, overruled.

26 *Bill of Exceptions.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } # 1251.

Be it remembered that on the trial of the above-entitled cause the jury, on the 21st day of February, 1891, returned into open court a verdict in favor of the plaintiffs, and thereupon a judgment was rendered upon said verdict.

That afterwards, on the 23rd day of February, 1891, the defendant's motion for a new trial was by the court overruled, and the defendant thereupon filed the following motion in arrest of judgment, to wit:

PIRONI & SLATRI
vs.
J. C. DENNY. } # —.

Now comes the defendant in the above-entitled cause and moves the court to arrest the judgment herein rendered because there is no allegation in the petition of plaintiffs showing that the plaintiffs and defendant are citizens of different States and no allegation to show that this court has jurisdiction to try this cause.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Defendant, J. C. Denny.

And afterwards, to wit, on the 24th day of February, 1891, and after the rendition of the final judgment in this cause and before the motion in arrest of judgment had been passed upon by the court, the plaintiffs filed in this cause a remittitur in words and figures as follows, to wit:

Suit in the Circuit Court of the United States for the Northern District of Texas, at Dallas.

PIRONI & SLATRI
vs.
J. C. DENNY. } #1251.

Now, at this time, come Pironi & Slatri, a firm and copartnership composed of C. B. Pironi and F. Slatri, the plaintiffs in the above numbered and entitled cause, each of whom is now and was at the date of the institution of this suit a citizen of the State of California and a resident of the city and county of Los Angeles, in said State of California, and show to the court that they, on the 21st of February, 1891, recovered a judgment against the defendant, J. C. Denny, who was at the date of the institution of this suit a citizen of the State of Texas and a resident of the city of Dallas, said State of Texas, within the northern judicial district of Texas, for certain personal property of the value of $2,224.70, and also damages for its detention in the sum of $238.29, besides interest and costs; and said plaintiffs now in open court remit the sum of five dollars of and from said sum of $238.29, the damages awarded in said judgment aforesaid; and plaintiffs pray that this remittitur may be noted on the docket and entered in the minutes, and that execution may issue in due course only for the balance of said judgment after deducting said sum of five dollars now here remitted from the damages adjudged as aforesaid.

(Signed) R. E. COWART,
McCORMICK & SPENCE,
Attorneys for Plaintiffs.

And thereupon the court overruled the defendant's motion in arrest of judgment.

It nowhere appeared from the record (except in said remit-
28 -itur so filed) that the plaintiffs are citizens of the State of California, or that they are not citizens of the State of Texas. The allegations of citizenship contained in plaintiffs' petition is as follows:

"That petitioners, who are hereinafter styled plaintiffs, are and were at the time of the accrual of the causes of action hereinafter stated a mercantile firm composed of C. B. Pironi and F. Slatri, enga-ed in the wholesale wine and liquor business in the city and county of Los Angeles, California, where both of said plaintiffs also reside; that defendant is a resident citizen of Dallas county, Texas, within the northern judicial district of Texas."

The defendant objected to the filing of said remittitur because the fact as to whether or not the plaintiffs were citizens of the State of California presented an issuable fact, which he was authorized and entitled under the law to controvert by plea in abatement, to be sustained by proper proof, and to the ruling of the court in overruling the motion in arrest of judgment the defendant then and there excepted; and because the above proceedings do not appear of record I, the judge before whom the above cause was tried, have, at the request of the said parties, hereunto set my hand and seal this the 24th day of February, 1891.

A. P. McCORMICK,
U. S. District Judge, Northern District of Texas.

The foregoing has the following endorsement, to wit:
#1251. Pironi & Slatri *vs.* J. C. Denny. Bill of exceptions. Filed Feb'y 25, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

29 *Petition of Plaintiffs in Error.*

JOHN C. DENNY, S. B. HOPKINS, & T. F. WALLACE, Plaintiffs in Error,
vs.
PIRONI & SLATRI, Defendants in Error.

To the honorable the judges of the circuit court of the United States of America:

Your petitioners, John C. Denny, S. B. Hopkins, and T. F. Wallace, respectfully show to this honorable court that in the record and proceedings, as also in the rendition of the judgment in the said circuit court of the United States for the northern district of Texas, at Dallas, at its January term, 1891, wherein C. B. Pironi and F. Slatri (composing the firm of Pironi & Slatri) were plaintiffs and your petitioner John C. Denny was defendant, and your petitioners S. B. Hopkins and T. F. Wallace were sureties upon a replevy bond, executed by said John C. Denny, a manifest error hath happened, to the great damage of your petitioners, as by said record and proceedings duly appear; and your petitioners, to the end that error, if any hath been, should be corrected and full and speedy justice done to your petitioners in this behalf, respectfully pray that this honorable court will duly inspect said record and proceedings, and that the judgment rendered in said cause by the said circuit court be reversed and a new trial awarded; as in duty bound your petitioners will ever pray.

——— ———,
——— ———,
Attorneys for Plaintiffs in Error.

Endorsed: J. C. Denny *et al.*, pl'ffs in error, *vs.* Pironi & Slatri, def'ts in error. Filed Feb'y 25, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

30 *Writ of Error Bond.*

Know all men by these presents that we, John C. Denny, S. B. Hopkins, and T. F. Wallace, as principals, and —— —— — ——, as sureties, are held and firmly bound unto Pironi & Slatri in the full and just sum of three thousand ($3,000) dollars, to be paid to the said Pironi & Slatri, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of February, A. D. 1891.

Whereas lately, at a term of the circuit court of the United States for the northern district of Texas, at Dallas, in a suit depending in said circuit court between Pironi & Slatri, plaintiffs, and J. C. Denny, as defendant, and S. B. Hopkins and T. F. Wallace, as sureties for said J. C. Denny upon a replevy bond, a judgment was rendered against the said J. C. Denny, S. B. Hopkins, and T. F. Wallace, and the said J. C. Denny, S. B. Hopkins, and T. F. Wallace having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation, directed to said Pironi & Slatri, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said J. C. Denny, S. B. Hopkins, and T. F. Wallace shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

31 J. C. DENNY,
Per CRAWFORD & CRAWFORD, *Att'ys.*
S. B. HOPKINS.
T. F. WALLACE.
J. B. COWAN.
E. M. TELLMAN.

Approved:
A. P. McCORMICK,
U. S. Dist. Judge.

The foregoing has the following endorsement, to wit:

J. C. Denny *et al. vs.* Pironi & Slatri. Writ of error bond. Filed M'ch 2, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Pironi & Slatri, plaintiffs, and J. C. Denny, defendant, and

S. B. Hopkins and T. F. Wallace, sureties upon a replevy bond executed by the said John C. Denny, a manifest error hath happened, to the great damage of the said John C. Denny, S. B. Hopkins, and T. F. Wallace, as by their complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from this date, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, this the 25th day of February, 1891.

J. H. FINKS,
Clerk of the Circuit Court of the United States, at Dallas, Texas,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—
A. P. McCORMICK,
United States District Judge for the Northern District of Texas.

33 [Endorsed:] No. —. Jno. C. Denny *et al.*, plaintiffs in error, *vs.* Pironi & Slatri, defendants in error. Writ of error. Filed Feb. 25, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

34 JOHN C. DENNY, S. B. HOPKINS, and T. F. WALLACE,
Plaintiffs in Error,
vs.
PIRONI & SLATRI, Defendants in Error.

To Pironi & Slatri, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from this date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein John C. Denny, S. B. Hopkins, and T. F. Wallace are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 25th day of February, A. D. 1891.

A. P. McCORMICK,
U. S. District Judge.

We accept service of this citation in error.
Feb'y 26, 1891.

McCORMICK & SPENCE,
Att'ys for Pironi & Slatri.

35 [Endorsed:] No. —. J. C. Denny *et al. vs.* Pironi & Slatri. Citation in error. Filed Feb. 25, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

36 *Assignment of Errors.*

PIRONI & SLATRI
vs.
J. C. DENNY.

Now come J. C. Denny, T. F. Wallace, and S. B. Hopkins and assign the following errors:

1. The court erred in overruling the motion in arrest of judgment for the reasons assigned in said motion.

2. The court erred in permitting the remittitur to be filed, no jurisdiction being shown by any part of the record except the allegations of diverse citizenship contained in said remittitur, which was not filed until after the trial and judgment and after the motion for new trial had been overruled and the motion in arrest of judgment filed.

CRAWFORD & CRAWFORD,
Att'ys for J. C. Denny et als.

The foregoing has the following endorsement, to wit:
Pironi & Slatri *vs.* J. C. Denny *et als.* Assignment of errors. Filed Ma-ch 2, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

37 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, in the fifth circuit, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause # 1251, wherein Pironi & Slatri are plaintiffs and J. C. Denny *et al.* are defendants, lately pending in said court, at Dallas, Texas, except that the original writ of and citation in error are included in the transcript instead of copies thereof.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof, this the 11th day of March, A. D. 1891.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas., Dallas.]

J. H. FINKS,
Clerk of said Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: N. Texas C. C. U. S. No. 1661. John C. Denny, S. B. Hopkins, and T. F. Wallace, plaintiffs in error, *vs.* Pironi & Slatri. Filed March 18, 1891.

Office Supreme Court U. S.
FILED,
APR 20 1891
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

DENNY ET AL.

v.

PIRONI & SLATRI.

No. 1661.

BRIEF OF JOHN JOHNS FOR THE PLAINTIFFS IN ERROR.

The plaintiffs in error make the following assignments of error:

1. The Court erred in overruling the motion in arrest of judgment for the reasons assigned in said motion.

2. The Court erred in permitting the remittitur to be filed, no jurisdiction being shown by any part of the record except the allegations of diverse citizenship contained in said remittitur, which was not filed until after the trial and judgment, and after the motion for new trial had been overruled and the motion in arrest of judgment filed.

We submit that the court below did not have jurisdiction, and erred in not sustaining the motion in arrest of judgment. (R. pp. 12, 14, 16.)

The averments of facts by plaintiffs on which the verdict of the jury was rendered, and on which verdict the judgment of the court was given and entered, nowhere show adverse citizenship of the plaintiffs and defendants below, and the error is apparent on the record, for on its face the

court had no jurisdiction, could neither try the case nor enter the judgment.

The circuit court could not proceed unless the adverse citizenship of the parties is distinctly averred in the pleadings or appear affirmatively in some other part of the record. (Stevens *v.* Nichols, 130 U. S. 230.)

The averment of residence in the petition (R. 1) is not the equivalent of that of citizenship for purpose of jurisdiction. (Menard *v.* Goggan, 121 U. S. 253.)

There being no jurisdiction when that judgment of February 21, 1891 (R. 10), was rendered and entered, it was, we submit, null and void; no judgment at all. Nowhere at that time did the pleadings or record show jurisdiction.

Had a valid judgment been entered February 21, 1891 (R. 10), that, under article 1352, R. S. of Texas, 1879, p. 212, which is as follows:

"Article 1352. Any person in whose favor *a judgment* has been rendered, may in open court remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted," might have been in part remitted. But there was no judgment whereof to remit a part, for the Court had no jurisdiction to render the judgment of Feby. 21, 1891 (R. 10).

A court will not amend its *decree* by inserting points not in the pleadings (Adams *v.* Law, 17 Howard, 417). We submit that under article 1352, R. S. of Texas, *supra*, the court below could not, even had it entered a valid judgment or any judgment on Feby. 21, 1891 (R. 10), have opened that judgment so as to permit the insertion therein of points or facts not in the pleadings. The remittitur can only effect the purpose and intent for which it is allowed by the statute of Texas above referred to, and that is to remit any part of the judgment; then the Court can make the proper

reduction, and enter judgment accordingly, and the latter is the final judgment (Alabama Gold Life Ins. Co. *v.* Nichols, 109 U. S. 232).

In Robertson *v.* Cease (7 Otto, 645), this Court, Harlan, Justice, delivering the opinion, says: "When we declared that the record, other than the pleadings, may be referred to in this Court to ascertain the citizenship of parties, we alluded only to such portions of the transcript as properly constituted the record upon which we must base our final judgment, and not to papers which had been *improperly* inserted in the transcript."

It seems to us this allegation of adverse citizenship in the *remittitur* attempted (R. 13), was improperly inserted, and that the court below should not have permitted it, and erred in overruling the objection of the plaintiff in error to such permission (R. 16).

In Marine, etc., M. & M. Co. *v.* Bradley (105 U. S. 175) this Court says: "To confer or oust jurisdiction when that depends on citizenship, the necessary facts must be distinctly alleged *and* admitted or proved." The record nowhere shows this requirement of law complied with, and there was no jurisdiction in the court below. The adverse citizenship could not under the Texas statute, *supra*, providing for a remitter be made a part of the record; it is nowhere in the record "alleged and admitted or proved," and no jurisdiction is conferred. Hence the final judgment is null and void. (Robertson *v.* Cease, and Marine, etc., M. & M. Co. *v.* Bradley, *supra*.)

For the reasons stated above I respectfully submit that the judgment of the court below should be reversed as the proceedings were *coram non judice*.

JOHN JOHNS,
For Plaintiffs in Error.

Supreme Court of the United States.

DENNY *et al.*,
vs.
PIRONI AND SLATRI.
No. 1661.

Brief of W. Hallett Phillips for Defendants in Error.

This action was brought in the Circuit Court for the Northern District of Texas, by C. B. Pironi and F. Slatri.

The complaint states that, "The plaintiffs are a mercantile firm, composed as aforesaid, engaged in the wholesale wine and liquor business, in the city and county of Los Angeles, California, where both said plaintiffs also reside; that defendant is a resident citizen of Dallas county, Texas."

The object of the suit was to recover certain goods or their value, which the plaintiffs had been deprived of by gross fraud participated in by the defendant.

The defendant answered on the merits. R. 8.

The case was tried before a jury and there was a verdict in favor of plaintiffs for the amount of their claim, and judgment accordingly. R. 9.

The defendant, February 23, 1891, filed a motion for a new trial, founded on alleged errors in instruc-

tions to the jury, and on the ground that the verdict was contrary to the evidence. R. 11.

This motion was overruled; and, thereupon, on February 24, he filed a motion in arrest of judgment, on the ground that there was no allegation *in the petition*, showing the citizenship of the plaintiffs. R. 12.

On February 24, the plaintiffs entered the following remittitur of part of the judgment:

> "Now, at this time, come Pironi & Slatri, a firm and co-partnership composed of C. B. Pironi and F. Slatri, the plaintiffs in the above numbered and entitled cause, each of whom is now and was at the date of the institution of this suit, a citizen of the State of California, and a resident of the city and county of Los Angeles, in said State of California, and show to the Court, that they, on the 21st of February, 1891, recovered a judgment against the defendant, J. C. Denny, who was, at the date of the institution of this suit, a citizen of the State of Texas, and a resident of the city of Dallas, in said State of Texas, within the Northern Judicial District of Texas, for certain personal property of the value of $2,224.70, and also damages for its detention in the sum of $238.29, besides interest and costs; and said plaintiffs now, in open court, remit the sum of five dollars of and from the said sum of $238.29, the damages awarded in said judgment aforesaid; and plaintiffs pray that this remittitur may be noted on the docket and entered in the minutes, and that execution may issue in due course only for the balance of said judgment, after deducting said sum of five dollars now here remitted from the damages adjudged as aforesaid." R. 12.

Whereupon it was considered by the court, and so ordered and adjudged, that said remittitur be noted on the docket and filed herein as part of the record of this case, and that said sum of five dollars be, and the same is hereby, remitted from the sum of $238.29 assessed and adjudged in said original judgment herein entered, on February 21, 1891; and it is further ordered, that execution issue for the balance only of said original judgment, after deducting the said amount of five dollars so here remitted. R. 13, 14.

The motion in arrest of judgment was overruled.

The defendant brings the case here, under the act of 1889, for the determination of a question of jurisdiction alone.

The contention is, that it was error in the court below in overruling the motion in arrest of judgment and allowing the remittitur.

The point seems to be that the allegation of citizenship to support the jurisdiction, must necessarily appear in a pleading on which issue can be taken.

But the question here is, whether the final judgment of the Circuit Court should be reversed because the *record* failed to show the jurisdiction. The *manner* in which the jurisdictional fact appears is not material, if the fact is shown on the face of the *record*.

In the present case, when the Circuit Court entered its final judgment on the remittitur, there appeared on the record the proper allegations as to the citizenship of the parties.

These were not contradicted by the defendant.

It cannot, therefore, be said that the judgment was rendered without jurisdiction.

The power of the court to allow a remittitur in the interests of justice, is well established, and is discretionary. For the purposes of jurisdiction, this court is confined to the judgment entered on the remittitur.

Pacific Express Co. vs. *Malin*, 132 U. S., 537.

Where the jurisdiction depends upon the character of the parties the facts upon which it rests must, of course, appear in the record.

They need not necessarily, however, be averred in the *pleadings*. It is sufficient if they are in some form affirmatively shown by the *record*.

Railway Co. vs. *Ramsey*, 22 Wall., 326.
Briges vs. *Sperry*, 95 U. S., 401.
Robertson vs. *Cease*, 97 U. S., 648.
Bondurant vs. *Watson*, 103 U. S., 285.
S. S. Co. vs. *Tugman*, 106 U. S., 122.

Here the record proper, clearly shows the jurisdiction. The very judgment which is sought to be reversed, states the requisite facts.

The only complaint seems to be as to the manner in which the jurisdiction is shown, and it is argued that it only appears from the remittitur and the judgment thereon.

This is sufficient. There is no denial that the facts there stated, are true.

It was not attempted to be shown that, in point of fact, the requisite citizenship, did not exist.

While under the act of 1789, an issue as to the fact of citizenship, could only be made by a plea in abatement, the subsequent acts do not prescribe any particular mode in which the question is to be brought to the attention of the court. If at any time the want of jurisdiction appears, the court must dismiss the case.

Norris vs. *Gilmer*, 129 U. S., 327.

Any mode, whether by affidavits or otherwise, at any time can be resorted to, for the purpose of showing want of jurisdiction.

When such an objection is made, the fact of citizenship can be made to appear, in the *record*, in any manner satisfactory to the Court.

The particular form in which it should be done, is not a jurisdictional inquiry.

This Court can only reverse the judgment on the ground that the *record* shows a want of jurisdiction.

Here the record shows the contrary of this; and, as has been shown, if there was a defective allegation in the petition, it was subsequently supplied.

It is not claimed that the statement of citizenship contained in the record was conclusive.

It made, however, a *prima facie* case of jurisdiction.

The court will not now reverse the judgment for want of jurisdiction, because the statement should have been made in some more formal way.

It was not made in the petition in the manner required by the rulings of this Court, through inadvertence of counsel.

The objection was not raised by the defendant in the progress of the trial, but was reserved until after a verdict and a judgment on the merits.

No opportunity was given to the plaintiffs, of supplying the proper allegation in their petition, and it hardly lies in the mouth of the defendant now to complain that the citizenship could only be stated in the pleadings.

In a case of fraud, such as is shown by the record, there would be a failure of justice, if the judgment should be reversed on the ground suggested.

We submit that it should be affirmed.

W. HALLETT PHILLIPS,
for Defendants in Error.